

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRANADA WELLNESS & REHABILITATION CENTER

Employer

And

Case 20-RC-268518

SEIU EMPLOYEES INTERNATIONAL UNION, LOCAL 2015

Petitioner

EMPLOYER'S REQUEST FOR REVIEW

I. INTRODUCTION

For the reasons set forth more thoroughly below, Granada Rehabilitation and Wellness Center ("Employer") files this Request for Review pursuant to Board Rules and Regulations Section 102.67(c) and (d)(3). The Employer contends that Region 20 failed to properly investigate and take action concerning a very serious COVID outbreak at the facility which occurred right as employees were expected to make important decisions about whether or not to vote for union representation. The Region has also rejected a post-election Objection filed by the Employer arguing that the Region's refusal to properly consider the COVID outbreak and its impact on the election. The Region's lack of action concerning this matter was prejudicial error, and the Employer therefore asks the Board to either 1) set aside the election results on its own, or 2)

order the Region to conduct a thorough review of the circumstances which existed at the facility and determine whether the election results should stand.

The Employer operates a skilled nursing facility in Eureka, California. After SEIU Local 2015 filed a petition seeking to represent various employees at the facility, the parties agreed on a mail ballot election to be conducted by Region 20 of the NLRB. Ballots were to be mailed out on December 7 2020, returned on January 4, 2021, and counted on January 11, 2021.

On November 29, 2020 – nine (9) days before ballots were to be mailed out – the facility was hit with the beginnings of a very serious COVID outbreak. More than twenty five (25) of the facility's approximately seventy (70) residents tested positive for COVID on November 29 and 30. Throughout December, the outbreak only worsened, leaving virtually all seventy three (73) facility residents infected with the virus, and a significant portion of the approximately ninety (90) person workforce also infected and required to be quarantined. By the end of December, twelve (12) facility patients had passed away from COVID, and dozens of other facility residents, management and staff had suffered symptoms ranging from mild to severe.

Region 20 was alerted to the situation at the facility on both December 1 and December 2. The Employer requested that the Region postpone the election given the dire circumstances at the facility, or at a minimum investigate the situation further to determine whether a postponement was appropriate. However, with virtually no consideration given, and with

absolutely no investigation undertaken, the Region quickly responded to the Employer's requests and determined that the election should proceed as scheduled.

It is the Employer's view that the scant attention paid by the Region in light of the horrendous outbreak which ensued should result in either: 1) the overturning of the election results, or 2) a thorough investigation conducted by the Region to determine whether the circumstances which existed at the facility allow for the election results to stand.

In making this Request for Review, the Employer notes what we all know – this once in a century pandemic has brought this nation to its knees, and has caused widespread death, misery, instability and damage. The pandemic has led to unheard of restrictions on everyday life, and has drastically changed the way that most Americans lead their lives. Against that backdrop, it was unacceptable for the Region to refuse to even look into the information provided to them about the dire situation at the facility. Had they bothered to investigate, the Employer contends the Region would have, or at least should have, determined that it was simply unfair and unacceptable to hold an election amongst eligible voters at this facility given the extraordinary and emergent circumstances it faced.

II. FACTS

The Employer operates a skilled nursing facility in Eureka, California which provides 24 hour nursing care to its frail, disabled and/or elderly residents. The facility has a maximum capacity

of eighty seven (87) residents, and employs approximately ninety (90) individuals, with many in nursing, dietary, housekeeping and laundry positions. (Declaration of Alice Brasier filed herewith, para. 2 and 3).

In early November, 2020, SEIU Local 2015 filed a petition with Region 20 of the NLRB, seeking to represent various facility employees. The parties eventually signed a stipulation for a Board election to be conducted by mail. Ballots were to be mailed out on December 7, 2020 and returned by January 4, 2021. The ballot count was scheduled for January 11, 2021. (Declaration of Rick Albert filed herewith, para. 1 and 2).

A. A serious COVID outbreak occurred at the facility

On or about November 29, 2020, the facility was hit with a COVID outbreak. More than twenty five (25) of the approximately seventy (70) facility residents tested positive for COVID on November 29 and 30. Over the month of December, the outbreak worsened significantly. By the end of December, 2020, virtually all facility residents had been infected with the virus. Almost all residents suffered with symptoms from the virus, with those symptoms ranging from moderate to severe. Twelve (12) facility residents died from COVID during the month of December. (Brasier Dec., para. 4,5,6)

Facility management and staff were also affected by the virus. Facility managers such as the Administrator, the Director of Nursing, the Assistant Director of Nursing, and the Housekeeping

Director all were infected. The Director of Staff Development – an important nursing position – quit her employment during December because of her concerns about the outbreak at the building, as did the Activities Director. The Dietary Director had so many employees out with COVID during December that she had to perform the work of absent employees instead of her own supervisory responsibilities. More than twenty (20) facility employees were also infected with the virus. (Brasier Dec., para. 3, 7)

The vast majority of facility management and staff who contracted the virus were symptomatic with symptoms ranging from mild to serious. Those who were symptomatic were required to remain away from the facility in quarantine for at least fourteen (14) days. Some needed even longer to recover from the infection – the Director of Nursing, for example, missed an entire month with symptoms from the virus, as did the Director of Housekeeping. (Brasier Dec., para 8).

In addition to those managers and employees who needed to stay away from the facility due to COVID symptoms, several other employees either refused to work while the outbreak continued to rage inside the facility, and others resigned from employment. (Brasier Dec., para 8).

These extraordinary circumstances dramatically impacted facility operations, as well as facility management and staff. The short staffing created by the numerous COVID positive managers and staff forced the remaining employees to work extra hours under very difficult

circumstances. In fact, at times employees were forced to work double shifts of sixteen (16) hours each. (Brasier Dec., para 9).

The absences of several managers also impacted facility operations in a very negative way, as managers were not available to both assist with patient care as well as provide direction and supervision to the remaining employees still able to work. (Brasier Dec., para. 10)

The grave situation with facility residents presented an extraordinary emergency.

With virtually all residents sick with COVID, employees were forced to perform numerous additional patient care tasks which would not have been required of them in normal circumstances. Greatly increased vitals checks, oxygen level measurements and other measures were needed to insure the health of a very sick patient population, which added a great deal of time and stress to employee work efforts. (Brasier Dec., 9 and 10).

The net effect of a severely reduced workforce and management staff, combined with an extraordinarily sick and needy resident population resulted in an extremely chaotic and unbearable situation for facility staff. Employees needing to work under these extreme conditions suffered from exhaustion. Additionally, many of those employees – with children and possibly parents/grandparents at home – were forced to deal with the overwhelming anxiety of bringing home the virus and infecting their loved ones. (Brasier Dec., para. 12)

The deaths of twelve (12) residents were particularly crushing to facility employees. Most of these residents had been at the facility for long periods of time, and many facility employees had become very close to them. Their deaths were extremely upsetting and emotional for facility employees. The facility held a memorial on site for those who had died, where employees shared their memories and grief at the loss of residents they had come to know as family members. (Brasier Dec., para. 6).

The totality of circumstances at the facility - which included a raging and very dangerous facility-wide infection, short staffing, fewer management personnel, a patient population which was COVID positive and needing far greater than usual assistance, and employee concerns about the health and well-being of themselves and their family members created an untenable and ongoing emergency which put an extraordinary amount of stress, strain and fear on the facility's workforce. (Brasier Dec., para. 10 and 11).

B. Employer efforts to have the election postponed, or investigation conducted, were rejected outright.

On December 1 and again on December 2, Employer representative Rick Albert emailed Region 20 representative Janay Parnell and notified her about the COVID outbreak at the facility. Those emails made clear that facility management and employees were deeply concerned about health and safety issues due to the emergence of the deadly virus at the facility, and

established that the Employer's intended communication plan with employees was wiped away because of the virus outbreak. The Region was asked to either postpone the election until the outbreak cleared up, or at least investigate the situation further to determine if action needed to be taken to ensure that employees had a free and fair opportunity to vote. (Albert Dec., para. 3,4,5 and 6; Exh. 1 and 2).

The Region gave almost no consideration to the Employer's expressed concerns. The first request for postponement sent on behalf of the Employer was rejected within approximately thirty (30) minutes. The second request for postponement and/or investigation was similarly given short shrift by the Region and was likewise rejected within 45 minutes. The Region's sole expressed basis for failing to even look at the circumstances presented was that ballots could be mailed out and employees would have four weeks to return them. The Region did not ask for specific additional information of any kind, and gave no indication that it had carefully reviewed the circumstances in any way. (Albert Dec., Exh. 1 and 2).

The glaring lack of concern shown by the Region to these extraordinary circumstances made clear to facility representatives that the Region had no intentions of taking any action in response to the outbreak, and convinced them that further efforts to pursue the Region's review would prove fruitless. (Albert Dec., para. 7).

C. The outbreak impaired Employer ability to communicate with its employees

The emergency situation at the facility dramatically impaired the Employer's intended communications with employees about union related matters. Prior to the election the Employer had retained labor relations consultants with expertise in developing and presenting a series of communications concerning union-related matters to be delivered on site to employees. Those consultants had planned on various on-site presentations to employees before ballots were to be mailed out, with several important presentations scheduled for the first week of December. The consultants had also intended to maintain some presence at the facility on-site during much of December to continue to answer questions employees may have raised about these same issues and provide additional guidance to management. (Brasier Dec., para. 12).

Those plans went up in smoke as soon as the outbreak commenced. The consultants were instructed to leave the facility for their own health and safety. They were never able to return to the facility due to the severity and length of the outbreak. Additionally, given the onerous working conditions that employees were facing throughout the month of December, the facility felt that it could not and should not make any efforts to communicate with employees about union-related matters while they were at work. Moreover, knowing that employees were exhausted and deeply concerned about their own health and safety issues as the outbreak spread throughout the building, the Employer determined that it was inappropriate to communicate with employees away from the facility about the union vote while the stress and fear of the outbreak continued. (Brasier Dec., para. 14 and 15)

The net effect of these circumstances was to totally disrupt the guts of the Employer's intended communication program with its employees about an issue of significant import to management and employees alike. As unfair as that was to the Employer, it was also apparent that the union did not suffer a similar disruption of its communication plans. Union representatives were repeatedly observed speaking with employees outside the facility. The Employer also became aware that the union was contacting employees at their homes. (Brasier Dec., para. 16).

III. ARGUMENT

The Regional Director's refusal to postpone the election here, or even investigate the circumstances afflicting the facility, was erroneous and prejudicial to the Employer. This Request for Review is therefore grounded in Board Rules and Regulations Section 102.67(d)(3).

This Request for Review is not draped in weighty legal principles. This is instead a common sense Request, grounded in the all too obvious truth that an NLRB election – whether by mail or in person – should not be held among the workforce of a nursing home where all residents are sick with COVID; where management personnel is dangerously thinned out because of illness; where numerous employees are out for 2 weeks or more with COVID symptoms; where employee workloads become onerous and unacceptable; where employees have to endure and grieve over the deaths of one dozen of the residents they cared for; where employees become extremely fearful for their own health, the health of their own family members, and the health

of the residents they care for; and where the Employer is unable to communicate and campaign with its employees in any reasonable way. The Region's decision to blithely proceed with the election - simply because ballots could still be sent out and employees had time to return those ballots - is unacceptably simplistic, blatantly erroneous and prejudicially ignores the extraordinary circumstances which this facility and its employees faced at the very time those employees were expected to make significant decisions about whether or not to be represented.

- A. The Region's refusal to even consider the impact of the serious COVID outbreak at the Employer's facility stands in stark contravention to the attention paid by the Board to the COVID pandemic and its impact on representation elections.

In recognition of the need to give voters the opportunity to cast their ballots free from unacceptable and disruptive influences, the NLRB maintains any number of rules and limitations about such matters as how, when and where the parties to an election can communicate with employees, as well as how Board agents are to conduct themselves during election proceedings. Despite those volumes of guidance designed to ensure voter rights, Region 20 here could not be bothered to spend more than a few minutes contemplating and/or investigating whether a full blown outbreak of a deadly virus at a nursing facility might somehow and in some way affect the quality and fairness of an ongoing election proceeding. This is particularly troubling given all the attention the Board has already paid to the unparalleled uncertainties caused by the pandemic - as the Board has repeatedly recognized

that the “usual rules” must be reevaluated in the context of this once in a century phenomenon.

In the spring of 2020, the Board temporarily stopped all elections due to the COVID pandemic. Subsequent to that action, the Board published General Counsel guidance, other guidelines, and recent case law in an effort to assist the Regions and the parties in determining how elections are to be held in the era of COVID. All of this activity by the Board is in clear recognition that NLRB elections during this extraordinary period are anything but ordinary, and that the Board must carefully evaluate whether and how elections can be properly, safely and fairly conducted during this time.

Against that backdrop of intensive Board scrutiny of the impact of the pandemic on NLRB voting processes, the Region’s failure to address in any manner whatsoever the concerns expressed by the Employer resulting from a deadly COVID outbreak at its facility was clear prejudicial error. Indeed, the Region should have far carefully considered whether a serious outbreak of this deadly virus – particularly in the close quarters of a skilled nursing facility – could have had such a dramatic and negative impact on employees that it would be patently unfair to expect them to make unencumbered and fair decisions about representation during the height of such a deadly outbreak. This Employer – who along with its staff suffered unimaginable hardship, losses, grief and stresses throughout the month of December, 2020 - vehemently contends that the Board could have, and should have, conducted just such a review of this situation instead of blithely ignoring the situation the facility was facing and simply ordering the parties to proceed.

The failure to conduct such a review was prejudicial error necessitating the rejection of the election results; or at a minimum a post-election investigation to determine whether the election results can stand.

In responding to the Employer's stated concerns, the Region was correct in saying that the U.S. Mail could still get ballots to employees, and that those employees had time to return those same ballots. However, that is nothing more than a superficial and mechanical response to a complex and extraordinary situation. Instead of swatting away the Employer's concerns as if a deadly COVID outbreak during an NLRB election was an everyday occurrence, the Region- at a minimum- should have conducted a real investigation into the death, damage and fear at this nursing facility in the midst of a horrendous outbreak – and properly evaluated whether those conditions allowed for the kind of fair and appropriate election proceeding that the Board has long required. It must also be noted that the Region also had sufficient time to conduct just such an investigation – it was notified of the COVID outbreak several days before ballots even were to be mailed.

It is also noted that only 64% of eligible voters returned their ballots – a clear indication that an unacceptably large percentage of them were preoccupied with the COVID outbreak rather than their collective bargaining rights.

The Regional Director is certainly aware that NLRB elections require employees to make significant decisions about union representation in a setting that allows for free and fair voting.

That responsibility was shirked here by the Region's refusal to even consider the COVID outbreak at the Employer. Employees here were saddled with an exhaustive workload, onerous working conditions, the deaths of various of their patients, and deep concerns about their own health as well as the health of their loved ones. It was a grave disservice to those employees for the Region to refuse to seriously consider the impact on them of the disastrous working conditions they were facing at the time they were expected to make serious decisions about union representation free from distraction and disruption.

For all of the above reasons, the Employer believes that any election conducted under these standards does not NLRB standards, and that the results of same should be rejected and overturned. Alternatively, the Board should order the Region to conduct a thorough investigation of these circumstances so it can be determined whether the election was properly held.

B. The Region made clear to the Employer that there was no purpose in raising additional concerns about the situation at the facility

It is anticipated that the Region will respond that the Employer should have itself provided more information concerning conditions at the facility while the election was still in progress. However, that argument would ignore the simple fact that the Employer – on two separate occasions – did bring to the Region's attention that there was a serious COVID outbreak at the facility, and argued that the Region should postpone the election or at least conduct an

investigation to determine how best to deal with this extraordinary situation. The Region twice rejected those arguments in a matter of minutes, leaving the Employer to understand that the Region simply would not concern itself with, and would take no action related to, the facility's COVID outbreak.

As of November 29, 2020 the Region was aware that there was a serious COVID outbreak at the facility, and should have recognized that such an outbreak could have impacted the fairness and quality of the election it was holding. If the Region felt that it had insufficient information to evaluate how that outbreak might impact the election proceedings, it had every ability and opportunity to conduct its own investigation into the situation. NLRB Regions conduct all varieties of administrative investigations in the context of representation proceedings when they become aware that a need for such an investigation exists. Region 20 was made well aware of such a need in this proceeding, and it was the Region – not the Employer – which had the responsibility to delve into the situation further.

D. The Region failed to properly consider and give weight to the Employer's inability to communicate with its employees during the outbreak.

It is black letter NLRB law that both parties to a representation election must have the unfettered opportunity to communicate with employees about union representation in any lawful way they so desire. The Region is also well aware that most employers – as was the case with this one – prefer to communicate with employees on site and face to face. The Region

was advised that this method of communication became unavailable to the Employer due to the circumstances at the facility. Again, the Region paid no attention whatsoever to this clearly legitimate concern. In so doing, the Region denied the Employer the opportunity to present its position on unionization in the manner it intended as it had every right to do, thereby preventing the Employer from presenting a proper and full-throated presentation of its position.

The horrific conditions which existed at the facility also made it more than difficult for the Employer to communicate its views to employees in other ways. As was undoubtedly also the case for many of its employees, the Employer determined that focusing all its attention on the outbreak and the lives at stake was a far more important calling at that time than trying to educate employees about the realities of unionization. As a result, the Employer made a conscious and entirely appropriate decision not to bring union concerns into the workplace once the outbreak occurred, and also decided that it would not unnecessarily bother exhausted, grieving and concerned employees at home with union-related matters. The sum total of these circumstances make clear that the outbreak stood as a major impediment to the Employer's rights to communicate with its employees.

Rendering the situation all that more unacceptable is the common understanding that unions do not rely on on-site communication to voters. Even in light of the situation involved here, the union was still able to communicate with employees as it so chose away from the facility. While the Employer was unable to communicate with employees as it had desired, the union

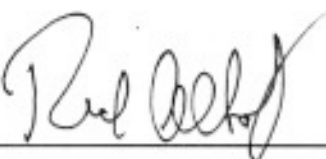
faced no such limitations. This additional concerns makes the Region's refusal to even consider the impact of the outbreak that much more of a prejudicial error.

IV. CONCLUSION

This election should have been postponed for all the reasons identified above. Alternatively, a thorough investigation should have been conducted by Region 20 to determine if the election could proceed under the circumstances. Neither happened here. The Region's failure to do anything other than summarily reject the Employer's concerns was prejudicial error, and for that reason this Request for Review should be granted.

2/9/21

Date



On Behalf of Granada Wellness & Rehabilitation Center